



DEFENSE LOGISTICS AGENCY
HEADQUARTERS
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SEP 05 2001

IN REPLY
REFER TO J-33

MEMORANDUM FOR COMMANDER, DEFENSE SUPPLY CENTER COLUMBUS
COMMANDER, DEFENSE SUPPLY CENTER RICHMOND
COMMANDER, DEFENSE SUPPLY CENTER PHILADELPHIA

SUBJECT: Domestic Non-Availability Determinations

Under Secretary of Defense (Acquisition, Technology and Logistics) (USD (AT&L)) memorandum, dated April 24, 2001, cancelled the Defense Logistics Agency authority to make domestic non-availability determinations (DNAD) under the Berry Amendment. All such DNADs must now be made by the USD (AT&L).

The Berry Amendment requires designated items to be of domestic origin, of domestic content, and manufactured in the United States or its possessions unless a determination is made that the product cannot be acquired as and when needed in satisfactory quality and sufficient quantity at U.S. market prices. This requirement applies to any article or item of food, clothing, tents, tarpaulins, covers, cotton, and other natural fiber products, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, canvas products, or wool, certain items of individual equipment, specialty metals including stainless steel flatware, or hand or measuring tools grown, reprocessed, reused, or produced in the United States or its possessions, unless USD (AT&L) grants a DNAD. See 10 USC 2241 note.

Attachment 1 contains guidance on preaward and post-award issues related to the Berry Amendment. Attachment 2 contains guidance on DNADs and supporting reports and recommendations to be submitted by the Commanders of the Supply Centers. These formats may be modified over time as we become more experienced in dealing with OSD.

Mr. Frank Pane, J-336, DSN 427-1461, is the point of contact for Berry Amendment preaward and post-award issues. Ms. Catherine Heretick, J-335, DSN 427-1361 is the point of contact for DNAD issues.

CLAUDIA S. KNOTT
Senior Procurement Executive

2 Attachments



SUGGESTED ACTIONS TO MINIMIZE BERRY AMENDMENT VIOLATIONS

PREAWARD:

The increased attention and visibility that the Berry Amendment domestic source restrictions are receiving has created a growing awareness and sensitivity among DLA contractors of the considerable restrictions levied by this statute and the DFARS implementing guidance. This heightened awareness has resulted in a number of contractors notifying DLA regarding their violation of this statute, and requesting DLA grant a “waiver.”

The identification of potential violations *after* contract award presents considerable difficulties for the Agency. Once made aware of the violation, DLA is presented the challenge of not accepting the non-conforming end item(s) pending waiver consideration in order to ensure no Anti-Deficiency Act (ADA) violation occurs. This not only can result in delayed delivery to the customer, it also may place the contractor in an untenable financial position. To minimize the impact, the affected ICP is faced with the daunting task of quickly analyzing the market to verify that no domestic source is available and preparing a domestic non-availability determination (DNAD). This DNAD must be fully staffed within both the ICP and DLA HQ prior to submission to USD(AT&L) for approval consideration (numerous OSD offices must also review/coordinate prior to a USD(AT&L) decision). Additionally, external pressures (e.g., small business status, Congressional interest) are often present in such situations.

The following preaward steps will assist in minimizing the potential for identification of Berry Amendment violations after contract award. While the potential use of the suggestions below may be dependent upon the size and complexity of the procurement, they provide a guide for your use.

- **Pre-Proposal Conference:** If a Berry Amendment covered item is to be procured and a pre-proposal conference is held, the domestic source restrictions of the Berry Amendment should be highlighted to the attendees. This not only highlights the importance to the attendees, it also allows for the correction of misunderstandings (eg., different from the Buy American Act).
- **Full Text Clause Inclusion:** The Berry Amendment is implemented by DFARS clause 252.225-7012 (252.225-7014 for specialty metals and 252.225-7015 for hand or measuring tools). Many activities incorporate these clauses by reference that requires the contractor to actively research the content of the clause. While it is the responsibility of the contractor to adequately understand all solicitation requirements, to include the contents of 252.225-7012/7014/7015, the statutory background of the clause, the heightened attention compliance with the clause is receiving, and the significant difficulties non-compliance presents makes the clause an ideal candidate for full text inclusion in the solicitation.
- **Plain Language:** The development and inclusion in solicitations of “plain language” that spells out the Berry Amendment domestic source restrictions is a consideration. However, such language must be used with caution and must have headquarters’ approval. Subtle changes in the wording of the domestic source restrictions could be

legally and contractually misinterpreted by the contractor, causing conflict with the exact requirements of the clauses at DFARS 252.225-7012/7014/7015. Any such “plain language” wording would need to have significant legal review to confirm that nothing in the developed wording modifies the requirements at DFARS 252.225-7012/7014/7015 (as interpreted by GAO cases, etc) levied upon the contractor. Additionally, the “plain language” should only address the part of the Berry Amendment that applies to the commodity being solicited.

- **Mandatory Discussion Item:** When negotiated procurements are conducted for Berry Amendment covered items, domestic source restrictions as identified in DFARS 252.225-7012/7014/7015 should be a mandatory discussion item with the contractor. Contractors should be asked to confirm their understanding of the requirement in the documentation submitted with their final proposal revisions or other submitted documentation.
- **Preaward Surveys:** If a preaward survey is requested in accordance with FAR 9.106, the ICP should consider requesting the survey also confirm the prospective contractor’s ability to trace the origin of materials incorporated into the end product being acquired.
- **Evaluation Factor:** ICPs can consider whether use of an evaluation factor that determines the contractor’s ability to verify the source of materials is appropriate. Such a factor would most likely be a technically acceptable/unacceptable rating. Additionally, such a factor should be used judiciously, considering the complexity of the manufacturing process and size of the procurement so as not to unduly burden less “at risk” procurements.
- **Additional considerations:** The development/use of a formal contractor certification verifying compliance with the requirements of the Berry Amendment is not recommended. The actions highlighted above should provide sufficient contractor awareness and Government assurance of contractor knowledge of Berry amendment domestic source restrictions.

POST AWARD:

Post-award actions relative to the domestic source restrictions of the Berry Amendment fall into 2 general categories: 1) actions that may be taken to ensure continued contractor compliance during contract performance; and 2) actions that should be taken once a potential Berry Amendment violation is detected.

Potential actions to ensure continued contractor compliance: Although it is clearly the performing contractor’s responsibility to ensure full compliance with all contract requirements, to include the Berry Amendment restrictions specified in DFARS 252.225-7012/7014/7015, the Agency can take reasonable steps, where appropriate, to validate the contractor’s continuing Berry Amendment compliance. Such actions may reduce the potential for violations during performance. Violations detected during performance could result in Government non-acceptance of materials, delaying support to the warfighter, and non-payment to the contractor for the non-conforming items.

- Berry Amendment compliance should be a discussion item at post-award conferences.

- The Defense Contract Management Agency (DCMA) is delegated responsibility to review, approve or disapprove, and maintain surveillance of the contractor's purchasing system, per FAR 42.302(a)(50). ICPs should consider requesting additional on-going DCMA emphasis of the contractor purchasing system's ability to implement domestic source restrictions, and continuing verification of such through random records audits, etc.
- Prime vendor (PV) contracts present a unique challenge due to the multitude of parts and suppliers that are frequently involved. The opportunity for Berry Amendment violations is even greater because of the commerciality of the products provided under these contractual instruments. ICPs should consider the development of contract provisions that require the PV contractor to periodically assess their suppliers' compliance with Berry Amendment domestic source restrictions. The nature and extent of the provision would be dependent upon the particulars (i.e., number of items under contract, length of period of performance, extent that supplies to be provided are subject to Berry Amendment restrictions, etc.). Potential alternatives include periodic (e.g., quarterly) review of a certain percentage of total items under contract. The review could be as straightforward as the PV contractor sending the suppliers a standardized sheet explaining the restrictions of the Berry Amendment and requiring the supplier to notify the prime contractor of any potential violation. The supplier could also be required to acknowledge receipt of the document by signing and returning it to the prime.

Actions to take after contractor notification of a potential Berry Amendment violation:

- **Verification:** Ensure the item in question is subject to the restrictions of the Berry Amendment. Direct the contractor to positively determine the origin of the item in question.
- **Suspend Government Acceptance:** The Government, in accordance with FAR 46.407, should not accept items that have non-domestic content in violation of the Berry Amendment. It must be stressed that continued Government acceptance without the required DNAD could create an ADA violation. The ICP should consider the issuance of a stop work order pending resolution of the violation. Allowing the contractor to continue performance after notification of the violation could subject the Government to additional claimed contract costs and further exacerbate the violation.
- **Suspend Payment:** The ICP should ensure DFAS does not issue payment for non-conforming products nor make any new unauthorized progress payments pending resolution.
- **Market Research:** Determine whether the item in question has a domestic source available.
- **Substitute Product:** For those items where it is subsequently determined a domestic source is not available, ICPs should coordinate the potential for use of an alternate item (e.g., synthetic fiber vs. goat hair) with the technical specification OPR.

Prepare DNAD and Report and Recommendation: Prepare any resultant DNAD and supporting Report and Recommendation of the PLFA in accordance with this memorandum.

Domestic Non-Availability Determination (DNAD) Guidance

Submit both hard and electronic copies of the DNAD and supporting report and recommendation of the Inventory Control Points (ICPs) (DNAD package) to the HQ DLA Acquisition Programs Team (J-335) focal point* for your organization 4 to 6 months in advance of when needed. The DNAD review and approval process is lengthy and questions can be raised at any level. Once J-335 receives the package, it will be forwarded to J-336 and DG for review. Review comments, issues or concerns will be consolidated by the J-335 focal point and discussed with the ICP. Minor changes may be made at HQ DLA; major changes will require the package to be returned to the ICP for revision.

In situations where the ICP becomes aware of the need for a Berry Amendment waiver on a post award basis, the same DNAD package requirements are required.

Once HQ DLA coordinates on the DNAD package it is forwarded to the Under Secretary of Defense (Acquisition, Technology and Logistics) (USD (AT&L)), through the Principal Deputy Under Secretary of Defense (AT&L); Director, Defense Procurement; and Deputy Under Secretary of Defense (Logistics and Materiel Readiness). Additionally, DNAD packages must be reviewed by the OSD Office of General Counsel, and may be reviewed by the DoD Office of General Counsel for Legislative Affairs.

All Executive Summaries and DNAD submissions must be in Times New Roman font, 13-point typeface.

Consider assigning a single office with the responsibility to write DNADs and PLFA reports and recommendations. The benefit of this approach is for that office to develop the understanding and experience to know what the minimum standards are for DNADs to be approved. It will also allow for a central focal point for OSD feedback as DNAD requirements change.

Acquisition Programs Team DNAD Focal Points*

ICP	Commodity	Focal Point	Telephone (DSN)
DSCC	All	Catherine Heretick Melody Reardon **	427-1361 427-1362
DSCR	All	CDR Ed Sheehan Jim Cotton **	427-1478 427-1364
DSCP	C&T	Paul Sabatini Vanessa Ward **	427-3760 427-4335
	Medical	Jim Cotton Catherine Heretick **	427-1364 427-1362
	Subsistence	Catherine Heretick Melody Reardon **	427-1361 427-1362
	G&I	Paul Sabatini Vanessa Ward **	427-3760 427-1467

** Alternate Focal Point

Executive Summary to USD(AT&L)

- Signed by the DLA Senior Procurement Executive.
- Limit Executive Summary to 1 page.
- Summarize the circumstances resulting in the DNAD request.
- Reference the DNAD as Tab A, and the supporting Report and Recommendation as Tab B.

TAB A - DNAD

- Limit DNAD to 1 page.
- DNAD should concisely focus on specific basis for concluding the article or item is domestically non-available and be very summary in nature. (The PLFA Report and Recommendation will contain further relevant supporting details.) Succinctly address:
 - Decision maker's authority.
 - Articles or items being procured.
 - Item or component not domestically available.
 - Class of items if applicable.
 - Current market research results (e.g., market research has not revealed any domestic sources.) A more detailed discussion of the market research efforts and results can be presented in the PLFA Report and Recommendation in support of the DNAD.
 - If appropriate, total quantity (including readiness quantities) to be procured and length of time the waiver is needed (e.g., period of contract performance). Separately prepare a corresponding FAR case for permanent waiver requests, to add applicable items to FAR 25.104. Highlight the fact that a case is being prepared in the PLFA Report and Recommendation in support of the DNAD.
 - DEPSECDEF requirement for buying activities to offer customers alternatives not requiring a Berry Amendment waiver, and the customers' certified responses.

TAB B - Report and Recommendation by the PLFA

The Report and Recommendation of the supply center concerned provides the back-up detail and documentation necessary to support a request by DLA for a DNAD by the USD (AT&L). The Report must be signed by the PLFA Commander or an individual acting in such capacity. Documents attached to the report should be preceded by a list of Tabs with a brief description of each document. The report contains a much more comprehensive statement of the facts than the DNAD and a more lengthy discussion of any special or unusual circumstances. In particular, the report must describe in detail the market research that was done, any constraints, the results of such research, and the reasonable conclusions drawn. If appropriate, attach copies of relevant market research related documents and records. Include letters from major contractors that explain why they are unable to either obtain the product domestically or identify the source of their product or components (more relevant to DNADs for prime vendor procurements).

The report must describe in reasonable detail exchanges between engineering support activities and customers concerning the possible existence of alternative items or components that would not require a Berry Amendment waiver. If appropriate, attach copies of memoranda, records and any other correspondence that may be relevant. PLFA letters to customers identifying alternatives not requiring a Berry Amendment waiver and "certified" customer responses must be attached to the report. Customer responses must be signed and certify why the alternatives presented are unacceptable. Written responses should be provided for each branch of the service

as appropriate. *(Note: These attachments are mandatory to comply with Deputy Under Secretary of Defense Wolfowitz memorandum, dated May 1, 2001, subject Berry Amendment.)*

The report may discuss the current supply and procurement situation, any Congressional involvement on behalf of constituent(s), contractors' commercial practices, etc. It may address potential political ramifications, morale issues, small business concerns, mission failure, troop support, etc. The discussion must include a procurement impact statement that describes what will happen if the DNAD is not approved.

There is no limit on the length of PLFA Report and Recommendation. The Report may be supplemented by the PLFA commander in response to requests for more information, further explanation or additional documentation.